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FEDERAL COMMUNICATIONS COMMISSION  
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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of )  
 )  
Definition of the Markets for Purposes )  
of the Cable Television Broadcast Signal )  
Carriage Rules )

CS Docket No. 95-178

To: The Commission

**REPLY TO OPPOSITIONS TO PETITION FOR RECONSIDERATION**

**INTRODUCTION**

Costa de Oro Television, Inc., the licensee of Station KJLA(TV), Ventura, California ("Costa"), by and through its counsel, and pursuant to Section 1.429(g) of the Commission's Rules, hereby files a Reply ("Reply") to the Oppositions submitted by Comcast Cable Communications, Inc. and CoxCom, Inc. ("Comcast"), Time Warner Cable ("Time Warner"), and the National Cable Television Association ("NCTA") (collectively, "Oppositions") to Costa's Petition for Reconsideration ("Petition") of the Order on Reconsideration and Second Report and Order, FCC 99-116, released May 26, 1999 ("Order").<sup>1</sup>

Costa, a minority-controlled entity, is the licensee of a full-power independent television station licensed to the city of Ventura, California, a community that has always been in the Los Angeles television market, be it as an ADI or DMA. Under the Arbitron Area of Dominant Influence ("ADI") system, KJLA had been mistakenly treated as being in the Santa Barbara television market. However, under the Nielson Media Research Designated Market Area ("DMA") system, KJLA is, without question, assigned to the Los Angeles television market.

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<sup>1</sup> This Reply is timely filed as the deadline for the filing of Oppositions was August 25, 1999.

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KJLA's must-carry rights will be affected by the change in the designation of local market, as Costa now must seek carriage, pursuant to Section 76.64(f)(2), on or before October 1, 1999, on Los Angeles cable television systems.

In the Petition for Reconsideration, Costa requested reconsideration of provisions of the Order dealing with issues raised in the Further Notice of Proposed Rulemaking, 11 FCC Rcd 6201 (1996). The first of these issues allows the Longley-Rice prediction methodology to be used in considering market modification petitions. The second permits rulings made utilizing ADI market definition methodology to be binding upon a Station where the use of DMA market definition methodology results in a change of that Station's market.

Costa asserted in its Petition that the Longley-Rice prediction methodology should not be a factor in consideration of market modification petitions as it will operate to frustrate the Congressional intent of the 1992 Cable Act. Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("Cable Act"). The NCTA opposed Costa's request for reconsideration on this issue, contending excluding Longley-Rice methodology will distort market modification petition outcomes and subvert statutory purposes.

Costa also asserted in its Petition that decisions made utilizing ADI market definitions should not be binding where a DMA market definition results in a change of a Station's market as the new DMA market designation renders nil the preclusive effect of the ADI-based decision. All three of the Oppositions oppose Costa's request for reconsideration, contending that factual and policy determinations made with regard to ADI market determinations are not affected by a change of local market under the new DMA market definition; that a new, general determination of a Station's market should not triumph over previously decided specific determinations.

Costa replies to the Oppositions as follows:

ARGUMENT

I Only Grade B Predicted Contours Should Be Utilized In Consideration Of Market Modification Petitions

In its pleading, the NCTA opposes Costa's request for reconsideration of the Commission's decision allowing for the use of Longley-Rice methodology in market modification petitions, contending exclusion of Longley-Rice methodology will distort market modification petition outcomes and subvert statutory purposes. NCTA's argument is wide of the mark.

Permitting cable systems to use the Longley-Rice methodology in filing market modification petitions will provide them with a way with which to avoid their must-carry obligations and will counteract the presumption of the carriage of broadcast stations in their DMAs. Such a result does not comport with the intent of the 1992 Cable Act.

The 1992 Cable Act, seeking to promote localism and the enduring presence of local broadcast voices on cable television systems, created the must-carry provisions now applicable to cable television systems. Cable Act §2(a)(15), Pub. L. 102-385, 1992 U.S.C.C.A.N. (106 Stat.) 1462 (1992); 47 U.S.C. § 534. These provisions mandated that cable operators must carry the signals of *local commercial broadcast stations* (defined as those stations within the *same television market* as the cable system) in order to "ensure that broadcast television remains available as a source of video programming for those without cable." Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994); 47 U.S.C. §§ 534(h)(1)(A), 535; Order, at ¶38, n.

104.

The Cable Act's clear intent was that cable systems must carry local commercial television Stations in their markets. 47 U.S.C. § 534(a) and (h)(1)(A). In fact, the presumption is that local Stations will be carried in their local markets. WLNY-TV, Inc. v. Federal Communications Commission, 163 F.3d 137, 144 (2<sup>nd</sup> Cir. 1998).

Market modification petitions are available to alter a determination of a broadcast Station's market. 47 U.S.C. § 534(h)(1)(C)(i); 47 C.F.R. § 76.59. They are not meant to be used to avoid must-carry obligations, but rather to ensure that television stations are carried in the areas which they serve and which form their *economic market*. H.R. Rep. 102-628, 102d Cong., 2d Sess. 97-98 (1992).

Grade B contours have been found to serve as an accurate measure of a Station's economic market, the factor controlling market modification petitions. See, e.g., H.R. Rep. 102-628 at 97 (stating petitions for market modification are available only in order "to ensure that television stations [are] carried in the areas which . . . form their economic market"); Amendment of Section 76.51, 102 FCC 2d 1062, 1070 (1985) ("[w]e believe that television stations actually do or logically can rely on the area within their Grade B contours for economic support").

Allowing the use of Longley-Rice evidence will only allow cable systems to avoid the Cable Act's must-carry obligations and its presumption of carriage of broadcast stations in their DMAs, resulting in the use of market modification petitions to avoid must carry obligations. A kind of map-shopping will ensue, allowing cable systems to choose the map, be it Grade B or Longley-Rice, that most favors its attempt to wipe the broadcast Station off of its cable system. Such map-shopping will in no way serve that purpose of modification petitions: determination of a

Station's proper economic market. It will only enable cable systems to avoid the Cable Act's must-carry obligations and the presumption of carriage of broadcast Station's in their DMAs.<sup>2</sup>

As (1) Congress has expressly stated its intent that cable systems carry local broadcast Stations, (2) courts have stated the presumption that such carriage occur within a broadcast Stations market, (3) market modification petitions are not supposed to be used by cable systems to avoid their must-carry obligations, and (4) the Commission has concluded that the use of Grade B contours best serves a determination of a Station's natural economic market, the goal of market modification petitions, it is clear the use of Longley-Rice maps will only serve to frustrate the clearly expressed intentions and presumptions of both Congress and the Commission.<sup>3</sup> As such, Costa urges the Commission to confine itself to the consideration of Grade B predicted contour maps in the consideration of market modification petitions.

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<sup>2</sup> This result has been anticipated by Congress in its finding that cable systems, given competition for advertising dollars from broadcast stations, would delete, reposition, or fail to carry broadcast Stations due to the lack of economic incentive to do so. Cable Act §2(a)(15), Pub. L. 102-385, 1992 U.S.C.C.A.N. (106 Stat.) 1462 (1992).

<sup>3</sup> The disproportionate effect on small broadcast stations and potential reintroduction of the UHF handicap also speak forcefully against the use of Longley-Rice methodology.

Use of Longley-Rice methodology will impose a hardship upon Costa, a minority-owned broadcast station unaffiliated with the top networks, whose programming is targeted at the multicultural population of Los Angeles, as it will complicate the market modification process, forcing Costa to obtain expensive Longley-Rice research and respond to expensive and time-consuming litigation. Such a hardship is contrary to the Commission's own stated intent. Order, ¶38.

Additionally, use of Longley-Rice maps will reintroduce the the "UHF handicap." The UHF handicap stems from Congress' and the Supreme Court's determination that struggling stations, most of which operate on UHF frequencies, are those the Cable Act was designed to cover, and that any change of policy which treats UHF Stations less favorably than VHF Stations runs counter to specific Congressional findings found constitutional by the Supreme Court. Turner Broadcasting System v. United States, 520 U.S. 180 (1997) (independent local broadcasters tend to be the closest substitutes for cable programs, and thus the most likely to be dropped); Cable Act, Pub. L. 102-385, Section 2(a) (economic viability of Stations not carried by cable is threatened). Congress had sought to eliminate the UHF handicap by granting all stations must-carry status throughout their designated television market, rather than by their Grade B contours, or other measures. See, OET Bulletin 69, July 2, 1997.

II Market Modification Cases Decided Under ADI Market Definition Are Inapplicable Due To The Change of Local Market Under the New DMA Market Definition

Costa would like to reemphasize the unusual nature of the situation with which it is faced. KJLA, under the ADI system, had been mistakenly assigned to the Santa Barbara television market instead of the Los Angeles television market where it belonged owing to the fact that the Station was licensed to a community that has always been in the Los Angeles ADI and DMA. Costa disputed both its assignment to this market and decisions which stemmed from this erroneous decision. However, now KJLA is located in the Los Angeles DMA, its proper local market. For Costa to be bound by decisions that were based on an erroneous initial presumption that Costa repeatedly disputed and that, in any case, has been changed, is illogical and beyond the pale of reason.

The Oppositions contend that factual and policy determinations made with regard to ADI market determinations are not affected by a change of local market under the new DMA market definition, and appeal to notions of *stare decisis* in support of this contention. However, Costa reiterates that where the switch from ADI to DMA market definition results in a new market for a Station, as is the case with Costa, decisions based on the ADI criteria should not have precedential effect.

The initial presumption in determining a Station's local market is that local stations will be carried in the DMAs in which they are located. WLNY-TV v. Federal Communications Commission, supra, 163 F.3d 144. Market modification decisions made as to KJLA were made, in part, based upon the initial, but incorrect, presumption that KJLA's market was, under ADI market definition, Santa Barbara. This erroneous presumption has been corrected, as KJLA's

market is now, under the DMA market definition, Los Angeles. As such, decisions which did not take this change into account should no longer have effect.

As stated in the Petition, sound legal principles support this conclusion. Giving effect to prior market modification petitions made utilizing ADI criteria implicates the doctrines of collateral estoppel and res judicata, doctrines which apply to agency determinations made when acting in a judicial capacity. See, e.g., Stanton v. District of Columbia Court of Appeals, 127 F.3d 72 (D.C. Cir. 1997); Astoria Federal Savings and Loan Association v. Solimino, 501 U.S. 104 (1991). As changes in law or fact will render collateral estoppel and res judicata inapplicable, market modification decisions made utilizing ADI criteria should not have effect where the switch to DMA criteria results in a new market. Community Hospital v. Sullivan, 986 F.2d 357 (10<sup>th</sup> Cir. 1993); Jaffree v. Wallace, 837 F.2d 1461 (11<sup>th</sup> Cir. 1988).

Removing the preclusive effect of decisions made under ADI market definition will not result in the wholesale disruption of subscriber viewing patterns. In the case at hand, the net impact per cable system will be a single channel, i.e. the addition of KJLA will only cause one of the many available non-broadcast services to be dropped, a result that will hardly have a material impact on the cable operators, the public interest, or service to the Los Angeles market.

*Stare decisis* should not triumph over good cause. The switch to DMA market definition has resulted in the definition of KJLA as a Los Angeles market station, which KJLA has long been entitled to. This switch should remove precedential effect from decisions utilizing initial presumptions based on KJLA's former allocation to the Santa Barbara market under ADI market definition.

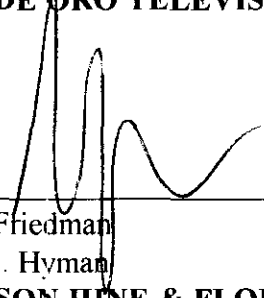
### CONCLUSION

With the Commission's switch to DMA market definition, and the resultant conclusive treatment of KJLA as a Los Angeles market station, Costa, a minority-controlled entity, is that much closer to fully serving its minority audience, and thus, the intent of must-carry and the Cable Act.

However, the intent of must-carry and the Cable Act can only be fully served by confining the Commission to consideration of standard Grade B contours in deciding market modification petitions and removing the preclusive effect of market modification decisions made under ADI market definition where a station's DMA market is dissimilar.

Respectfully submitted,

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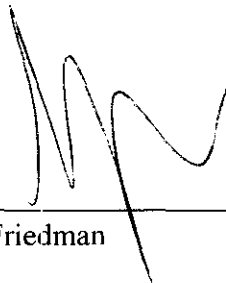
**CERTIFICATE OF SERVICE**

I hereby certify a copy of the foregoing Reply to Oppositions to Petition for Reconsideration was served this 9th day of September, 1999, via United States Mail, First-Class, pre-paid, upon the following:

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